EXECUTIVE OFFICIALS AND PROCESS OF SUBPŒNA TO TESTIFY.

IT IS stated in text-books that executive officials are not exempt from the power of the court to compel the attendance of necessary witnesses.[1] Executive officials are necessary witnesses to acts done as such officers, and papers on file in the various departments are sometimes the only evidence to prove a meritorious cause of action. In recent patent litigation infringement was based on sales to the United States;[2] in another case prior use by the engineers of the Navy Department was relied upon to invalidate a patent.[3] To what extent can a court assist its suitors to obtain testimony of officers and records from the various departments at Washington? The question has arisen not only in patent litigation but also in actions for the delivery of a commission,[4] concerning public lands,[5] and frequently in actions for libel.[6]

The Constitution provides that the executive power shall be vested in a President.[7] The executive departments exist by congressional legislation.[8] This paper is to deal with officers of the executive departments and not with the President. The Supreme Court in granting a writ of mandamus to the Postmaster-General drew a distinction between the President and his subordinates.[9] This distinction disposes of cases in which the President is involved, and of the argument that courts should

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[1] 40 Cyc. 2161.

[2] International Curtis Marine Turbine Co. *v.* William Cramp and Sons Ship and Engine Co., 176 Fed. 925; In re Grove (C. C. A.), 180 Fed. 62 (same matter on appeal).

[3] Kintner *v.* Marconi Wireless Telegraph Co. of America, U. S. D. C. (New Jersey), 1914 (not reported).

[4] Marbury *v.* Madison, 1 Cranch 137.

[5] Cases cited by Wigmore, §§ 2367-2376.

[6] Captain McKenzie's Case, 2 Parsons Equity Cases 227. See, also, 15 Opinions of Attorneys General, 415.

[7] U. S. Const. Art. II.

[8] Opinion by Taney, C. J., dissenting, Kendall *v.* U. S., 12 Pet. 524.

[9] Kendall *v.* U. S., *supra.*

not interfere with executive officers because they constitute a co-ordinate branch of the government of equal dignity with the courts. The executive power is vested in the President, but "it by no means follows that every officer in every branch of that department is under the exclusive direction of the President." [10] Mr. Lee in his argument in Marbury *v.* Madison insisted that the court had control of executive officials and even of the Secretary of State, in all matters save where they acted as agents of the President. The court seems to have accepted Mr. Lee's reasoning.[11]

The Constitution provides for compulsory process for witnesses in criminal cases.[12] An accused person would seem entitled to process against every one and Marshall's subpœna to Jefferson in the Burr case was justified under this provision of the Constitution. In United States *v.* Smith, a district and circuit judge agreed that a subpœna might issue to Madison as Secretary of State, but divided on the mooted question of enforcing such a subpœna by attachment.[13]

Congress has given the heads of executive departments power to regulate the conduct of officers and clerks and the custody and use of the department's records and papers.[14] These regulations are, however, not to be "inconsistent with law."

The statutes provide that the Court of Claims may call upon any of the departments for information and papers, and the head of any department may refuse to comply when in his opinion disclosure would be injurious to the public interest.[15]

Under the authority given in § 161 of the statutes the Secretary of the Navy has made regulations forbidding persons employed in the Navy Department to communicate reports, letters, or instructions without the express permission of the department.[16] The District Court of New Jersey issued a *subpœna duces tecum,* to a naval commandant and refused to vacate the order on the ground that the witness could not disclose the information under the regulations referred to above.[17]

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[10] Ibid.
[11] Marbury *v.* Madison, *supra.*
[12] Sixth Amendment.
[13] Fed. Cas. No. 16342.
[14] Revised Statutes, § 161.
[15] Judicial Code, § 164.
[16] United States Navy Regulations and Instructions 1913, § 1534 (2).
[17] Kintner *v.* Marconi, *supra.*

The Secretary of the Treasury has established similar regulations which have been before the Supreme Court. The Treasury regulations, litigated in Boske *v.* Comingore,[18] provided that collectors of internal revenue should have no discretion as to the use of records in their offices, and when copies of such papers were desired by parties to a suit the court having jurisdiction should call for the papers or information desired and the Secretary of the Treasury should transmit certified copies to the court unless it was necessary to decline in the public interest. A Kentucky court committed an internal revenue collector for refusing to testify as to certain records on file in his office. The Circuit Court issued a writ of habeas corpus;[19] the Supreme Court affirmed the action of the Circuit Court and held it was within the secretary's power to make a regulation taking all discretion as to the use of papers from subordinates and vest it in himself. The power of the secretary to pass on such public interest as would justify him in withholding information requested by a court was not in issue, as the collector was committed without issuing a request in the manner provided by the regulation. The case does not discuss how wide a discretion such regulation gives an executive officer in deciding when the public interest is sufficiently involved to justify withholding the information; nor does the court state whether it would review the decision of the secretary.

There is an agreement among the authorities that if the evidence sought involves military or naval secrets, or matters of international business, disclosure should not be required.[20] Further than this the authorities are not in accord as to what constitutes sufficient ground for an executive officer to refuse to disclose evidence, or who shall determine when the necessity for secrecy exists.[21] The statutes provide that when requests are made by the Court of Claims the opinion of the head of a department shall be controlling,[22] but there is no statute in regard to

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[18] 177 U. S. 459. [19] In re Comingore, 96 Fed. 552.

[20] Wigmore, Ev., § 2375; Greenleaf, Ev., § 250.

[21] Compare discussion by Wigmore, *supra*, with Hartranft's Appeal, 85 Pa. State 433.

[22] Judicial Code, § 164.

requests from other courts. Conceding that the courts should not compel the disclosure of military, naval or international secrets, how much further does the "public interest" extend? In the early Pennsylvania case charges made by the governor against an official were held to be beyond the power of a court to disclose.[23] The same was held in regard to the action of the governor in calling out the State militia to suppress a riot.[24] Since the governor was the official involved in each of these cases, they would not be controlling in the present discussion because of the distinction taken in Kendall *v.* United States, assuming that the State constitutions provide for a division of governmental powers. It was held that proceedings of a court-martial were not exempt from disclosures when the plea of public necessity was raised by army officers.[25] Plans of war vessels submitted in bids were declared by the Navy Department not to involve matters, the disclosure of which would be detrimental to the public interest, when the subpœna ran to the contractor who had made the bid.[26] Mr. Wigmore says the secrecy should be limited to military and naval international secrets,[27] and without extended discussion Mr. Greenleaf favors the view that the secrecy should be limited to strict public necessity.[28]

The power of a court to compel the attendance of a witness should be distinguished from the power to compel disclosure of evidence after the witness has appeared and been sworn. It is believed that in all cases the courts have issued subpœnas even to the President or governor.[29] In no case have the courts attempted to enforce subpœnas to the President or governor. As against subordinate executive officials the courts have always enforced attendance in obedience to subpœnas and in many cases have compelled disclosure of evidence when the plea of public

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[23] Gray *v.* Pentland, 2 Serg. & R. 22.

[24] Hartranft's Appeal, *supra.*

[25] Captain McKenzie's Case, *supra.*

[26] International *v.* Cramp and In re Grove, *supra.*

[27] Wigmore, Ev., §§ 2375 and 2376.

[28] Greenleaf, Ev., 250.

[29] United States *v.* Burr, Fed. Cas. No. 14692d; Thompson *v.* German Valley Ry. Co., 22 N. J. Eq. 111.

interest was raised by subordinate executive officials.[80] When an official refuses to disclose evidence and states as the reason for his refusal that the "public interest" is involved or would suffer by disclosure, the courts have in many cases asserted their power to go back of the official's statement and determine for themselves whether the necessity for secrecy exists.

In England the courts have considered the determination of an official that necessity for secrecy exists as binding on them.[81] Some English judges, however, have asserted a power to determine the question of necessity for secrecy for themselves. In Hennessy *v.* Wright, Justice Field said if such a question should arise before him in the first instance, he would examine the papers for himself and by questioning the official determine if there was any necessity for secrecy.[82]

The question arose in Canada and the court decided it was bound by the decision of an executive official that the public interest would be prejudiced by disclosure.[83]

In the Burr case Chief Justice Marshall, in issuing the subpœna to President Jefferson said there was nothing before the court to show that public interest was involved, thus intimating that the court should decide from facts presented to it whether the public interest was likely to be prejudiced.

In Captain McKenzie's case, the New York court sent commissions to be taken before the courts of Pennsylvania. These commissions included interrogatories to several naval officers as to the proceedings before a court-martial. The officers refused to testify on the ground of possible injury to the service. The court decided that they should testify and the depositions were taken.

Marbury *v.* Madison raised the question almost squarely. Mr. Lee in presenting Marbury's case called Mr. Lincoln, the act-

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[80] Hodgson *v.* Butts, Fed. Cas. No. 6563 (1807); Marbury *v.* Madison, *supra*; Kintner *v.* Marconi, *supra*; Captain McKenzie's case, *supra*. But see United States *v.* Smith, *supra*.

[81] Beatson *v.* Skene, 5 Hurl. & N. 837; Hennesy *v.* Wright, L. R. 21 Q. B. 509.

[82] *Supra*.

[83] Gugy *v.* Maguire, 13 Lower Canada 33, 38; 1 Stephens Quebec Law Digest, 510.

ing Secretary of State, and certain clerks in the office of the Secretary of State, to testify regarding the existence in the State Department of a certain commission. Mr. Lincoln and the clerks declined to testify on the ground that the information had come to them in the performance of their duties in the State Department and should not be disclosed. The court advised the witnesses that the information was not of a confidential nature but something all the world had a right to know. The court had no doubt that the witnesses should answer and the depositions were taken, including that of the Acting Secretary of State, Mr. Lincoln.[34]

When a plea of privilege is made by a witness to excuse the giving of testimony before a court, the court and not the witness determines if occasion for the privilege exists.[35] Perhaps the officers of the executive department cannot be considered the same as an ordinary individual. Executive officers are not above the law, however. Possible dangers to the public interest through unwise disclosure of evidence must be weighed against the danger that arises from vesting an arbitrary discretion in an official. With the courts, which have always been our protection against unscrupulous and arbitrary abuse of power, should rest the duty of determining if the public interest would be prejudiced by the disclosure of evidence that is necessary to the administration of justice.

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[34] Marbury *v.* Madison, *supra.*

[35] United States *v.* Burr, *supra;* Peoples Bank *v.* Brown, 112 Fed. 652.